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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 305

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Petitioner*

against

BENNETT F. SCHAUFFLER,
individually and as Regional Director for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board,

JACOB BLUM,
individually and as Regional Attorney for the 5th Region,
National Labor Relations Board, and as the National Labor Relations Board; and
The Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, who is now unknown, individually and as such Trial Examiner and as the National Labor Relations Board.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

THE RELIANCE PRESS OF NORFOLK, VA., INC.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Newport News Shipbuilding and Dry Dock Company, a corporation organized and existing under

the laws of the State of Virginia, prays that a writ of certiorari issue to review a decree of the United States Circuit Court of Appeals for the Fourth Circuit, affirming a decree of the United States District Court for the Eastern District of Virginia, refusing to grant to petitioner an injunction restraining respondents *pendente lite* from conducting a hearing and take other proceedings in relation to petitioner purporting to be had under the National Labor Relations Act; sustaining respondents' (defendants') motion to dismiss petitioner's bill; and dismissing said bill.

Opinions Below

The opinions below have not been reported.

That of the District Court appears in the record at page 68. That of the Circuit Court of Appeals appears in the record at page 87.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on August 2, 1937.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

(1) Whether a particular industry or concern which is not engaged in commerce, or in a business affecting commerce, within the meaning of the National Labor Relations Act, and is therefore not subject to the jurisdiction of the National Labor Relations Board, must submit to investigation by that Board, in other words,

Whether such an industry, although immune from the regulatory powers of the National Labor Relations Board, is, nevertheless, subject to the inquisitorial powers of that Board.

(2) Whether the National Labor Relations Board, has *exclusive* jurisdiction to determine, in the first instance, the question whether a particular industry or business is subject to its authority and powers of inquisition.

(3) Can said Board, by serving a formal complaint and notice, upon a concern which is not engaged in commerce, or in a business affecting commerce, within the meaning of said Act, acquire jurisdiction over such concern, and thus enlarge the powers of said Board?

Statute Involved

The National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Sup. II, Title 29, Sec. 151 et seq.) and certain rules and regulations promulgated by the Board purporting to have been made pursuant to said Act, appear in the record (pamphlet following R. p. 30).

Statement

Petitioner owns and operates a single shipbuilding plant, located at Newport News, Virginia. It designs, builds and repairs ships. This is always done under a special contract previously made in each case. Its chief business is the building of vessels for the United States Navy. Of its total business in 1936, 91.4% was shipbuilding confined solely to Naval Vessels, 5.8% was repair work, 2.8% consisted of hydraulic turbine

construction. No merchant vessels were built at petitioner's plant between June, 1934, and January, 1937. (R. 7). Vessels built for the United States Navy are delivered at the Norfolk Navy Yard, Norfolk, Virginia. All other vessels, either built or repaired, are delivered at petitioner's plant at Newport News, Virginia. Petitioner has not now, and has never had, anything to do with the manning or operation of any vessels built or repaired by it. It is not now, and has never been, engaged in commerce or in business affecting commerce within the meaning of the National Labor Relations Act. (R. 8). Petitioner employs approximately 7,500 men (R. 6). The relations between petitioner and its employees are entirely harmonious and no labor dispute exists between them. Since 1927 there has existed among petitioner's employees an organization created and controlled by themselves, known as the plan of "Representation of Employees". Petitioner does not contribute toward the expenses or funds of said organization and has at no time dominated, influenced or controlled said organization or attempted so to do. (R. 18, 10). On June 4, ~~1927~~, on JUN 4 Philip H. Van Gelder, Secretary-Treasurer, Industrial Union of Marine and Shipbuilding Workers of America, of 2332 Broadway, Camden, N. J., filed with the National Labor Relations Board a paper entitled a "charge", in which he alleged that petitioner is engaged in certain unfair labor practices affecting commerce. (R. 28).

Thereupon, on June 18, 1937, the National Labor Relations Board, issued, and on June 21, 1937 caused to be served upon petitioner a formal complaint, together with notice that a hearing thereon would be held in Newport News, Virginia, on July 8, 1937.

(R. 24). On the 29th day of June, 1937, petitioner caused to be served upon respondents Schauffler and Blum a copy of its bill of complaint, together with notice to the effect that at 10 o'clock A. M., on July 6, 1937, petitioner would move the District Court of the United States for the Eastern District of Virginia, for an injunction *pendente lite,* enjoining and restraining said respondents, their agents, etc., from proceeding with said proposed hearing. (R. 37). Petitioner's said bill alleged the facts hereinabove set out and other facts showing that petitioner is not engaged in commerce, or in a business affecting commerce, and showing that the proposed hearing would cause irreparable injury for which petitioner has no adequate remedy at law. For sufficient reasons the said application for a preliminary injunction was continued until July 14, 1937. On that day defendant Schauffler, as Regional Director of the National Labor Relations Board for the 5th Region, Jacob Blum, as Regional Attorney for said Board for said Region and the Trial Examiner for the National Labor Relations Board, designated or to be designated by the National Labor Relations Board, to conduct said hearing, appeared generally in the said suit in equity in the District Court of the United States for the Eastern District of Virginia, and filed a motion to dismiss petitioner's bill therein (R. 47), and also filed what they styled "Opposition of Defendants to Motion for Injunction *Pendente Lite*".

On that day the cause was heard by said District Court on said motion to dismiss the bill, and said Court held that the National Labor Relations Board has exclusive jurisdiction to determine, in the first instance, the question whether petitioner is subject to its jurisdiction and authority. (Opinion District Court

R. 68) and dismissed the bill (Decree R. 76). From this decree petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit (petition for appeal and assignment of errors, R. 77).

The said appeal was heard at Asheville, North Carolina, on August 2, 1937, and the decree of the Court below affirmed. (Per curiam Opinion R. 87. Decree R. 89).

Counsel for petitioner immediately applied for a temporary stay of the proposed hearing by said National Labor Relations Board, which was then set for August 5, 1937, to allow time to prepare and file a petition for certiorari and apply to one of the Justices of this Honorable Court for a temporary injunction enjoining respondents from proceeding with said hearing until the Court should have passed upon the granting of the writ of certiorari herein prayed.

The Court was disposed to grant said stay, but suggested to counsel that the said hearing be stayed by agreement. Thereupon counsel for respondent stated to the Court that he was unwilling to continue said hearing, but would consent to a continuance of one week, and would be guided by the suggestions of the Court. Thereupon the Court suggested that said hearing be continued for two weeks from August 5, 1937, and this was accordingly done by agreement.

There is now pending in this Court an application for writs of certiorari to the Circuit Court of Appeals for the First Circuit in the case of "Howard A. Myers individually and as acting Regional Director for the First Region, National Labor Relations Board et al v. Bethlehem Shipbuilding Corporation, Ltd., and Howard A. Myers, Edmund J. Blake, and Daniel M.

Lyons, individually and as the National Labor Relations Board v. Charles MacKenzie individually, etc., et al, Nos. 181 and 182." The Bethlehem case is in all of its material aspects precisely like the case presented in the record accompanying this petition.

And, whatever may be the general similarity of the pleadings in the several cases cited by the Circuit Court of Appeals in its opinion, this is the only case which is like the Bethlehem case in its facts.

Specifications of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In holding that whether petitioner is or is not subject to the jurisdiction of the National Labor Relations Board, it must exhaust the so-called administrative remedy provided by the National Labor Relations Act.

2. In holding that although petitioner may not be subject to the jurisdiction of the National Labor Relations Board, it must nevertheless submit to investigation by that Board.

3. In holding that the National Labor Relations Board has exclusive jurisdiction to determine, in the first instance, whether a particular industry or concern is subject to its jurisdiction and authority.

4. In holding that an industry or concern which is not engaged in commerce or in a business affecting commerce, when served with a complaint by the National Labor Relations Board, may not challenge the action of said Board by a suit in equity to enjoin the same, but must exhaust its so-called administrative remedies provided by said Act.

5. In failing to hold that on the facts alleged in petitioner's bill, and admitted by the motion to dismiss, petitioner is not engaged in commerce or in a business affecting commerce within the meaning of the National Labor Relations Act, and not subject to the jurisdiction of the National Labor Relations Board, and therefore immune from its inquisitorial powers.

6. In failing to hold that upon the facts alleged in petitioner's bill and admitted on the motion to dismiss, the National Labor Relations Board has no function whatever to perform with respect to petitioner.

7. In affirming the decree of the District Court.

Reasons for Granting the Writ

(1) The decision and decree of the Circuit Court of Appeals for the Fourth Circuit in this case is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of *Myers et al* v. *Bethlehem Shipbuilding Corporation, Ltd.*, 88 Fed. (2) 154, Rehearing denied 89 Fed. (2) 1000. The facts in that case and the questions of law involved are substantially identical with the facts and questions of law involved in this case. The application for a rehearing in the Bethlehem case was made and denied subsequent to the decision of this Court in the Jones and Laughlin group of cases decided April 12, 1937.

(2) The decree of the Circuit Court of Appeals decides an important federal question in a way probably in conflict with applicable decisions of this Court. See supporting brief.

(3) The question presented is one of great public importance.

(4) In the case of Bethlehem Shipbuilding Corporation, Ltd. v. Myers, etc., referred to above, an application for writs of certiorari has been filed on behalf of the National Labor Relations Board in the Clerk's Office of this Court, Nos. 181 and 182. Should writs be granted in that case on the application of the representatives of the National Labor Relations Board, the propriety of granting a writ in this case, which in all substantial respects is identical with that, becomes obvious. The two cases may then be conveniently heard together.

Conclusion

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment and decree of the Circuit Court of Appeals for the Fourth Circuit should be granted; that a temporary injunction should be awarded petitioner by one of the Justices of this Court enjoining the respondents, their agents, etc. from proceeding with said proposed hearing at any time before this Court shall have acted upon this petition; and that if said petition shall be granted, a further restraining order or temporary injunction should be awarded by this Court, enjoining respondents from proceeding with said hearing at any time prior to the final disposition of this cause.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,

By FRED H. SKINNER,
and
H. H. RUMBLE,
Of its Attorneys.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinions below have not been reported. Both appear in the record; that of the District Court, at page 68; that of the Circuit Court of Appeals, at page 87.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on August 2, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement

A summary and short statement of the facts and a statement of the errors relied on will be found in the petition, pages 3-8, *supra*.

ARGUMENT

I.

The National Labor Relations Act Has No Application To Petitioner.

In the Jones and Laughlin group of cases decided April 12th, 1937, this Court upheld the constitutionality of the National Labor Relations Act, but limited its scope to its only constitutional basis, namely the commerce clause of the constitution. The Court was careful to point out that the Act, by its terms, has no application to any concern which is not engaged in commerce, or in a business affeting commerce within the definitions contained in the Act.

As shown in the foregoing statement petitioner is not so engaged.

II.

The National Labor Relations Board Has No Jurisdiction of Petitioner.

Since as this Court held in the Jones and Laughlin group of cases that the Act "limits the jurisdiction of the Board to instances which fall within the commerce power", the Board has no jurisdiction of petitioner, and no function whatever to perform with respect to it.

Not being subject to the regulatory powers of the Board, petitioner is immune from its inquisitorial powers. The Board cannot enlarge its powers by serving a formal complaint and notice upon petitioner.

Ellis v. *Interstate Commerce Commission,* 237 U. S. 434, cited and followed in *United States ex rel Chicago, New York and Boston Refrigerator Company* v. *Interstate Commerce Commission,* 265 U. S. 292.

Also cited in *United States* v. *Pennsylvania Railroad Company,* 242 U. S. 208.

In the latter case it is said that the Armour Car Lines, which was held in the Ellis case, *supra,* not to be engaged in commerce, and hence not subject to regulation by the Commission, "had *immunity* from investigation". (Italics supplied).

See also *Jones* v. *Securities Commission,* 298 U. S. 1.

Under the decision of the Circuit Court of Appeals in the instant case there is no conceivable business that is immune from investigation by the National Labor Relations Board, should that Board see fit to serve it with a complaint and notice of hearing. It would have to exhaust the so-called administrative

remedies provided by the Act, which means going through with the investigation.

In the case of Bethlehem Shipbuilding Corporation, Ltd. v. Myers et al, in which the material facts are substantially the same as in this case, the District Court of Massachusetts granted a temporary injunction, enjoining the proposed hearing by the Board. (15 Fed. Supp. 915). On appeal to the Circuit Court of Appeals for the First Circuit the decree of the District Court was affirmed. (88 Fed. (2), 154).

Following the decision of the Supreme Court in the Jones & Laughlin and allied cases the National Labor Relations Board moved the Circuit Court of Appeals for leave to file a petition for a rehearing in the Bethlehem case. On this motion for a rehearing the Circuit Court of Appeals (May 13, 1937), 89 Fed. (2) 1000, distinguished the Jones & Laughlin and allied cases, denied the motion and said:

> "The appellants (National Labor Relations Board) . . . . urge that our decision in these cases is in conflict with that of the Supreme Court in National Labor Relations Board v. Jones & Laughlin Steel Corporation and allied cases . . . . It is obvious that the business here in question as described in the finding of the District Judge is very different in character from the 'far flung' enterprises of the Jones & Laughlin Steel Corporation, or from the essentially interstate business involved in" the allied cases . . . .
>
> "When the question is raised, as in this case, we think *it devolves on the National Labor Relations Board to show* that *the business* involved *is probably within its jurisdiction.* On the findings of the District Judge that fact is not established in the present case. We think

the case should stand for final hearing in the District Court." (Italics ours.)

As stated in the accompanying petition, a petition for writs of certiorari to the judgment and decrees of the Circuit Court of Appeals in that case has been filed and is now pending. If writs should be granted in that case, the justice and propriety of granting a writ in this case is obvious; for while a decision in that case would settle the public question involved, it would afford no relief to petitioner in this case.

III.

Petitioner Has the Right to Challenge the Proposed Action of the Board.

The bill in this case alleges that the proposed hearing by the National Labor Relations Board will, by requiring the attendance of its officers and employees, disorganize its business, interrupt the peaceful relations existing between petitioner and its employees, delay the completion of Naval vessels now under construction for the Government of the United States, thereby making petitioner liable for heavy demurrage, and otherwise work irreparable injury and damages, for which petitioner has no adequate remedy at law.

In *Washington, etc. Coach Co.* v. *National Labor Relations Board,* decided with the Jones and Laughlin case, Mr. Justice Roberts said:

> "As we have had occasion to point out in decisions rendered this day the act limits the jurisdiction of the Board to instances which fall within the commerce power, and if the Board should exceed the jurisdiction conferred upon it, any party aggrieved is at liberty to challenge its action."

It is respectfully submitted that this right of challenge is a right to challenge any proposed action by the Board not authorized by the statute; that the time to challenge it is before the mischief is done, the place, in the proper United States District Court, and the appropriate method, a bill in equity to enjoin such unauthorized proceedings.

This is the course followed by petitioner in this case, and, we submit, was and is the only feasible and proper method of challenging the action and authority of the Board when it proposes to pass beyond the bounds of its legitimate jurisdiction and authority.

Very respectfully submitted,

FRED H. SKINNER,
H. H. RUMBLE,
JOHN MARSHALL,
Attorneys for the Petitioner.